

**THE CARGILL DEFENDANTS’
RESPONSE TO PLAINTIFFS’ MOTION
TO COMPEL EXPERT DISCOVERY
REGARDING DR. THOMAS GINN
(DKT. NO. 2011)**

¹ Due to health issues with the lead attorney on this issue, the Cargill Defendants, with the agreement of the State, filed an Unopposed Motion to extend the deadline for the Cargill Defendants' response by two business days (Dkt. No. 2014), which the Court granted (Dkt. No. 2017).

26(a)(2)(b). However, upon further review of this Court's decisions regarding discovery of consulting expert materials, the Cargill Defendants concluded that some of the materials in Dr. Ginn's files from his tenure as a consulting expert might also be discoverable insofar as they related to the subject matter of his expert opinions. See B.H. v. Gold Fields Mining Corp., 239 F.R.D. 652, 660 (N.D. Okla. 2005); J.B. v. Asarco, Inc., 225 F.R.D. 258, 261 (N.D. Okla. 2004).

Therefore, in an abundance of caution, the Cargill Defendants made a supplemental production to Plaintiffs on April 14, 2009. The Cargill Defendants provided these materials because 1) they were factually related to the subject matter of Dr. Ginn's reported opinions, and 2) Dr. Ginn had at some point "seen" these materials. (See id. at 385:6-8.) Some of the materials produced on April 14 contain references to the privileged work of a separate confidential consulting expert; the Cargill Defendants carefully redacted these references and provided Plaintiffs with a detailed redaction log.²

As noted in the Unopposed Motion to extend the instant response deadline, to expedite resolution of this conflict and in the spirit of cooperation, the Cargill Defendants are agreeable to producing Dr. Ginn at a mutually agreeable time and place for a second deposition narrowly limited to issues pertaining to the supplemental materials produced on April 14, 2009. (Dkt. No. 2014 at 1.)

Plaintiffs' motion fundamentally mischaracterizes Dr. Ginn's testimony to suggest that Dr. Ginn relied on or considered the separate consulting expert's materials in formulating his expert opinion, and impermissibly seeks to

- (1) subject Dr. Ginn to a wide-ranging second deposition regarding his former role as a consulting expert and the role and work product of other independent consulting

² As the Court directed, the Cargill Defendants today provided the Court with unredacted copies of all documents identified on the redaction log for in camera review.

experts who advised the Cargill Defendants' attorneys separate and apart from Dr. Ginn;

- (2) obtain all "consulting" documents that Dr. Ginn ever "received" or "generated," regardless of whether they relate to the subject matter of his expert opinions or whether he considered the documents in forming his opinions in this case; and
- (3) discover the privileged consulting information of a separate undisclosed expert on a separate subject, which has been redacted from the April 14, 2009 materials and is reflected in the accompanying redaction log.

Because, as described below, the Cargill Defendants have produced all the materials to which Plaintiffs are entitled, the Court should deny this motion and allow the Cargill Defendants to maintain their privilege over highly confidential consulting experts' materials.

I. Rule 26(b)(4)(B) Protects the Cargill Defendants' Consulting Expert Materials.

The purpose of Rule 26(b)(4) is to prevent unfair surprise and frustration through expert testimony. Fed. R. Civ. P. 26(b)(4) advisory committee notes (1966). The advisory committee was particularly concerned about protective "effective cross-examination and rebuttal" of expert witnesses, which "requires advance knowledge of the line of testimony of the other side." Id. The Cargill Defendants have completely complied with this underlying policy.

Dr. Ginn's "line of testimony" as a testifying expert is as stated in his expert report. The Cargill Defendants have provided Plaintiffs with all materials that Dr. Ginn considered or relied upon in forming the expert opinions contained in his report. Whether he was generally or peripherally aware of or had "access" to unrelated consulting expert materials is irrelevant to his testifying expert opinion. Moreover, it is wholly unnecessary to prevent unfair surprise or frustration to Plaintiffs. The Cargill Defendants have fully complied with Rule 26(a)(2)(B) by disclosing "the data or other information considered by" Dr. Ginn in forming his testifying expert opinion, and have done nothing to preclude Plaintiffs from conducting an effective cross-examination and deposition of Dr. Ginn.

The Cargill Defendants are further entitled to use Rule 26(b)(4)'s "safe harbor" for a non-testifying, consulting expert's facts and opinions. See Plymovent Corp. v. Air Tech. Solutions, Inc., 243 F.R.D. 139, 143 (D.N.J. 2007). The policies underlying the safe harbor include:

- (1) encouraging counsel to obtain necessary expert advice without fear that the adversary may obtain such information;
- (2) preventing unfairness that would result from allowing an opposing party to reap the benefits from another party's effort and expense;
- (3) preventing a chilling effect on experts serving as consultants if their testimony could be compelled; and
- (4) preventing prejudice to the retaining party if the opposing party were allowed to call at trial an expert who provided an unfavorable opinion to the party who first retained them.

Id. The Plymovent court emphasized that "while discovery with respect to testifying experts is essential to allow opposing counsel to adequately prepare for cross-examination, and to eliminate surprise at trial, there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course litigation should take." Id. (citation omitted) (emphasis added).

As the party asserting waiver here, Plaintiffs bear the burden to establish that any waiver of the Cargill Defendants' consulting privileged actually occurred. See Asarco, 225 F.R.D. at 658. Courts have recognized that consulting expert materials enjoy a privilege akin to work product. For example, in Johnson v. Gmeinder, the District of Kansas found that the materials at issue were "both protected work product and 'privileged' materials of a non-testimonial expert." 191 F.R.D. 638, 643-44 (D. Kan. 2000) (cited in Asarco, 225 F.R.D. at 260). Once material is disclosed to and considered by the testifying expert in formulating his expert opinion, any expert work product "privilege" attached to the document is waived. Asarco, 225 F.R.D. at 261 (emphasis added); accord Gmeinder, 191 F.R.D. at 648 ("Courts have generally required that in order for waiver to occur, the work product must have been 'considered' by the expert in

formulating his or [*sic*] opinions.”).

Plaintiffs have not and cannot meet their burden show that the Cargill Defendants waived the work product nature of the undisclosed consulting expert materials. As discussed below, Dr. Ginn did not consider any of the undisclosed consulting expert work in formulating the opinions in his expert report. As a result, the withheld consulting materials retain their privileged status. It is essential to keep this consulting work confidential, particularly to prevent “unfairness that would result from allowing an opposing party to reap the benefits from another party’s effort and expense” and to prevent “a chilling effect on experts serving as consultants if their testimony could be compelled.” Plymovent Corp., 243 F.R.D. at 143. The Court should deny Plaintiffs’ motion.

II. The April 14, 2009 Document Production Did Not Entail Production of New Materials that Dr. Ginn Considered in Formulating his Expert Opinions.

No other party to this litigation has taken the time or effort to provide a redaction log for documents containing confidential information relating to a consulting expert’s work product. However, the Cargill Defendants recognized that there may be questions about Dr. Ginn’s former role as a consulting expert. Instead of withholding all documents containing confidential information stemming from the consulting work, the Cargill Defendants followed the guidance of this Court’s prior holdings (and fully complied with the Federal Rules) while maintaining the protections of confidentiality over privileged materials.

As this Court has directed, “documents are ‘considered’ under Rule 26(a)(2)(B) if the expert has ‘read or reviewed the privileged materials before or in connection with formulating his or her opinion.’” Asarco, 225 F.R.D. at 261 (quoting Lamonds v. Gen. Motors Corp., 180 F.R.D. 302, 306 (W.D. Va. 1998)). The term “considered” is broader than the term “relied upon,” and may include materials the expert “examines but rejects.” Id. (emphasis added); see

also Gold Fields Mining, 239 F.R.D. at 660 (if a former consulting expert is later designated to testify, he must disclose those materials he considered in forming his disclosed expert opinions).

Dr. Ginn testified that he did not evaluate any of the documents at issue in connection with formulating his disclosed expert opinions. (See Ex. 1: Ginn. Dep. at 383:8 – 386:4; see also id. at 184:15 – 188:14 (discussion by counsel explaining the production).) In addition, Dr. Ginn averred that “the redacted information has no relationship to my opinion in this matter.” (Id. at 385:25 – 386:2.)

Plaintiffs make too much of Dr. Ginn’s comment that he could not affirmatively state that the April 14 production contained no materials possibly related to his expert report. (Compare Pls.’ Mot. to Compel at 6: Dkt. No. 2011; with Ex. 1: Ginn Dep. at 184:15 – 188:15.) In context, it is clear that Dr. Ginn had a limited opportunity to review the documents at issue before he was questioned about them during the direct examination:

Q: So on the 14th, which is the day before your deposition, some additional materials were produced to us that were identified as your considered materials. Do you know what was in those considered materials?

A: I briefly looked through those materials that were produced before my deposition.

...

Q: Did – is any of the information that you described in the e-mails or otherwise related to the opinions that are contained in your expert report?

...

A: Well, there was a – there was a large amount of information there. As I recall, a couple of binders, and although I can’t think of any specific items that are directly related to my opinions, I don’t think I would be prepared to say that none of it is related to my opinions.

(Ex. 1: Ginn Dep. at 185:16-21; 186:15-24.) After having an opportunity to review the documents more closely, Dr. Ginn clarified that the April 14 document production did **not** include any materials he relied upon or considered in forming his opinion that were not produced earlier and listed in his expert report. (Id. at 383:4 – 386:4.)

Moreover, the documents produced on April 14 with the redaction log included a number of duplicative or previously produced materials, as well as pleadings and other reports already known to the State. (See Ex. 2: Jan. 30, 2009 production log; Ex. 3: Apr. 14, 2009 production log.) As this Court noted during the April 16, 2009 telephone conference, there is “no harm, no foul” where a supplemental production like this concern things that were generally known and does not provide new materials.³

In sum, there is no factual or legal basis for the Cargill Defendants to produce anything else regarding Dr. Ginn.

III. Dr. Ginn Had Separate and Distinct Roles as Administrative Project Manager, Consulting Expert, and Testifying Expert; None of These Roles Relate Substantively to the Work of Cargill’s Other Consulting Expert.

Plaintiffs attempt to semantically link unrelated, unconsidered, and otherwise privileged consulting information to Dr. Ginn’s testifying expert report under the guise that Dr. Ginn’s role as an administrative project manager elevated him to a de facto supervisor of the other consulting expert simply because both experts are employed by the firm Exponent, Inc.

The deposition transcript and facts do not support this characterization. While Dr. Ginn was in charge of budgeting and billing for both projects during the consulting phase, Dr. Ginn had no responsibility for the separate expert’s scope of work or work product beyond limited input into recommending possible members of the team. (Ex. 1: Ginn Dep. at 208:1 – 216:4.)

In the early stages of this litigation, the Cargill Defendants’ counsel hired Dr. Ginn to provide “general consulting advice” on available data for the Illinois River Watershed. (*Id.* at

³ (Ex. 1: Ginn. Dep. at 269:3-8.) During the second day of Dr. Ginn’s deposition when counsel for Plaintiffs and the Cargill Defendants telephonically appeared before this Court regarding issues arising in the deposition, the reporter at the deposition transcribed the telephonic proceedings and included them in Dr. Ginn’s transcript. (*Id.* at 259:23 – 271:23.)

182:15 – 184:14.) Early in the litigation, two teams of consultants were formed at the same consulting firm. The Cargill Defendants’ counsel specifically retained Dr. Ginn for consulting on “biological data” and he headed the “biological issues” consulting team. (Id. at 183:12 – 184:14; 188:16 – 189:23; 208:1 – 210:1.) Other personnel at the firm formed a separate “transport fate source dynamics” consulting team. (Id. at 208:1 – 216:4.)

The biological issues consulting team, led by Dr. Ginn, focused on a defined, narrow request to study the biological communities, specifically benthic macroinvertebrates and fish. (Id. at 189:16 – 184:2; 216:5-19.) Having worked on over twenty-five natural resource damages assessment projects, Dr. Ginn also aided strategy development by providing attorneys for the Cargill Defendants with “biological advice” on the nature of available data. (Id. at 146:1-7, 163:20 – 164:20.) For example, in this matter, he looked into the potential sources and effects of hormones and metals in aquatic systems. (Id. at 191:13 – 192:9.)

After Plaintiffs disclosed their first liability reports in May 2008, it became evident that the only area of Dr. Ginn’s focus warranting development into a testifying expert opinion was Dr. Ginn’s analysis of the biological community data for benthic macroinvertebrates and fish. (See id. at 218:8-17.) The general background and preliminary advice Dr. Ginn provided in his consulting role is unrelated to the biological community data that is the subject of his expert opinions. As he explained at length in his deposition, one can evaluate the biological communities without also considering the aquatic nutrient concentrations. (Id. at 192:10 – 194:6.) All the opinions Dr. Ginn plans to offer at trial are contained in his expert report. (Id. at 321:20 – 322:6.) All materials related to the biological community data and considered for his expert opinion – whether stemming from before or after he transitioned to a testifying expert – have been produced. (Id. at 384:22 – 386:2 (stating the redacted materials did not have any

relationship to expert opinion); id. at 184:22 – 185:11 (statement by Cargill counsel that Dr. Ginn’s considered materials included those from his initial retention).)

Dr. Ginn had no substantive role in the work of the separate and distinct transport fate source dynamics consulting team, and that team’s consulting work did not fall under Dr. Ginn’s purview. (Id. at 208:1 – 216:4.) Although he functioned as the “overall project manager” for the consulting relationship, in this capacity Dr. Ginn was simply the point-of-contact, administrative conduit between the consulting firm and the Cargill Defendants’ counsel. (Id. at 182:15 – 183:11; 208:1 – 216:4.) In his “project manager” role, Dr. Ginn was also responsible for ensuring that the teams were on time, within budget, and staffed properly. (Id. at 208:1 – 215:10.)

Throughout his deposition, Dr. Ginn stated that aspects other than the biological data were addressed by other members of the consulting teams or that he did not evaluate those aspects. (See, e.g., id. at 108:1 – 110:11 (did not evaluate temperature data, dissolved oxygen, phosphorus levels, phytoplankton or algae, chlorophyll-a levels, aerial hypolimnetic oxygen demand, or bacterial levels); 182:4-14 (did not evaluate fate and transport, nor particular phosphorus sources); id. at 189:16 – 190:10, 203:16-21 (did not examine water quality data); id. at 202:3-20 (did not review materials indicating poultry waste application contributes phosphorus to the watershed)). Specifically, Dr. Ginn did not evaluate phosphorus or dissolved oxygen levels as related to the benthic macroinvertebrates and fish in the watershed. (Id. at 195:3 – 196:2.) While he was “aware” of the other ongoing consulting projects, as the Exponent project manager, he did not participate in the other consulting team’s analyses, determinations, or conclusions. (Id. at 210:15 – 211:16.) Dr. Ginn averred that “the discussions were between that team leader and the client as far as the work that they were doing and it was not under my

purview to, to approve it.” (*Id.* at 212:1-12.) While Dr. Ginn participated in joint presentations to and meetings with the Cargill Defendants’ counsel and a client representative during the early consulting phase, his role was limited to the subject matters he evaluated as explained above. (*See id.* at 210:21-25; 383:4 – 384:21.) The Cargill Defendants have already produced to Plaintiffs Dr. Ginn’s unredacted powerpoint presentation to the client, and it was marked as an exhibit at his deposition. (*See id.*; *see also* Ex. 4, Ginn Dep. Ex. No 5.)

While Plaintiffs focus on the status reports that were attached to invoices (Dkt. No. 2011 at 4), as project manager Dr. Ginn neither “received” nor “reviewed” the reports in the manner Plaintiffs suggest. (Ex. 1: Ginn. Dep. at 227:18 – 230:16.) He stated merely that “we did” regular status reports and that he, as project manager, passed the reports on to the Cargill Defendants’ attorneys. (*Id.* at 228:1– 229:3.) There is no support in the record for Plaintiffs’ assertion that Dr. Ginn “presented” the status reports to Cargill. (*See* Dkt. No. 2011 at 4.)

In response to Plaintiffs’ expert reports, Dr. Ginn’s testifying expert role necessarily and solely focused on the biological communities data. He considered neither the other consulting team’s transport fate source work nor his previous, general consulting work in formulating his expert evaluation of biological data related to benthic macroinvertebrates and fish.

IV. Dr. Ginn Did Not Consider or Rely Upon Redacted or Withheld Materials In Forming His Expert Opinions.

Plaintiffs’ motion fixates on the fact that Dr. Ginn generally was “aware” of the other team’s consulting work. Similarly, at the deposition, in response to Cargill Defendants’ counsel’s instruction not to answer questions regarding the other consulting team’s work, Plaintiffs’ counsel argued: “But he is a testifying expert in the case and he has had access to that information.” (Ex. 1: Ginn Dep. at 201:11 – 203:21, emphasis added.) Being generally aware of or having potential access to a separate consulting expert’s work is not the factual (or logical)

equivalent of reviewing, considering, or relying upon that work – much less using it to formulate opinions.

Plaintiffs have provided the Court with no case law that would stretch the term “consider” to the point that Plaintiffs are asking this Court to accept, and the Cargill Defendants are likewise aware of none. Indeed, under Plaintiffs’ argument, *any* information of which Dr. Ginn is aware or could access that pertains to the litigation generally – despite bearing no substantive connection to his own expert work – would have to be produced as considered materials. Surely Rule 26(b)(4)(A) does not impose such a burden.

In Asarco, the defendants moved to compel neuropsychological evaluations of all plaintiffs to the litigation, including both sibling and non-sibling plaintiffs who had been dismissed. 225 F.R.D. at 259. This Court concluded that the evaluations of the non-siblings need not be produced as considered materials. Id. at 262. Unlike the dismissed siblings’ potential biological relevance for demonstrating the remaining plaintiffs’ neuropsychological deficits, “no evidence has been produced indicating that this [non-sibling] information has any relevance to the [expert] opinions.” Id. at 261-62.

The confidential consulting materials Plaintiffs seek here are akin to those non-siblings: not relevant to the expert opinion at play in the litigation. Materials from Dr. Ginn’s prior consulting role – other than those related to the biological community data, which have been produced – are not related to and were not used in the formulation of his testifying expert opinion. (See, e.g., Ex. 1 Ginn Dep. at 384:22 – 386:2 (stating the redacted materials did not have any relationship to expert opinion); id. at 184:22 – 185:11 (statement by Cargill counsel that Dr. Ginn’s considered materials included those from his initial retention)). Any of the general consulting advice Dr. Ginn provided falls outside the scope of the narrow study of

benthic macroinvertebrates and fish, as detailed in his expert report.

There is a similar disconnect between Dr. Ginn’s opinion as a testifying expert and the other consulting team’s work. Not only did Dr. Ginn *not* consider that team’s work in forming his opinion, but – even though he arguably had “access” to the other team’s work – he never analyzed, much less rejected, any of that team’s materials. Without providing Plaintiffs with the nature of the other team’s consulting work, it is clear from Dr. Ginn’s responses to Plaintiffs’ questioning that Dr. Ginn did not consider several elements that are unrelated to his study of biological community data. (See, e.g., *id.* at 108:1 – 110:11 (did not evaluate temperature data, dissolved oxygen, phosphorus levels, phytoplankton or algae, chlorophyll-a levels, aerial hypolimnetic oxygen demand, or bacterial levels); *id.* at 182:4-14 (did not evaluate fate and transport, nor particular phosphorus sources); *id.* at 189:16 – 190:10, 203:16-21 (did not examine water quality data); *id.* at 202:3-20 (did not review materials indicating poultry waste application contributes phosphorus to the watershed)).

The Cargill Defendants recognize that “[i]f the subject of the materials directly relates to the opinion in the expert report, this creates at least an ambiguity as to whether the materials informed the expert’s opinion,” and that ambiguities are resolved in favor of disclosure. *Asarco*, 225 F.R.D. at 261. But here, the materials sought by Plaintiffs are not directly related to Dr. Ginn’s expert report, such that no ambiguity arises. As discussed above, Dr. Ginn’s general consulting work and the other consulting team’s “transport source fate” work is not remotely related to an examination of the biological data concerning benthic macroinvertebrates and fish. Hence, the Court should uphold the Cargill Defendants’ appropriate exercise of privilege over the undisclosed consulting materials.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' motion. The Cargill Defendants are entitled to maintain confidentiality over their undisclosed consulting experts' work and opinions.

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CERTIFICATE OF SERVICE

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